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October 17, 2003

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WC Docket Nos. 96-98, 98-147

Dear Ms. Dortch:

Attached are the Comments of the Joint Commenters in the above-referenced proceeding, filed electronically on October 16, 2003 in WC Docket No. 01-338.

Kindly address any correspondence concerning these Joint Comments to the undersigned counsel.

Very truly yours,

DAVIS WRIGHT TREMAINE LLP

/S/

James M. Smith

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

Joint Comments of the American Farm Bureau, Inc., Anew Telecommunications Corporation d/b/a Call America, Creative Interconnect, Inc., Enhanced Communications Network, Inc., the Utilities Commission of New Smyrna Beach, and A+ American Discount Telecom, LLC

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October 16, 2003

SUMMARY

The Commission's existing "pick-and-choose" rule is an important statutory tool that has fostered smaller CLECs' ability to provide competitive local exchange services. The rule faithfully and successfully implements Congress' intent in Section 252(i) of the Telecommunications Act "to help prevent discrimination among carriers and to make interconnection more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated." The Supreme Court has strongly endorsed the rule, and indicated that it should not be abolished or gutted by this Commission unless it finds compelling and objective record evidence that it "significantly impedes negotiations" and disserves the Act's competitive objectives. The Commission's proposed alternative would be contrary to and unauthorized by the Act, would invite discrimination in interconnection negotiations, and would defeat the Commission's pro-competitive policy to "enable smaller carriers who lack bargaining power to obtain favorable terms and conditions – including rates – negotiated by large [carriers], and speed the emergence of robust competition." The pick-and-choose rule should be preserved.

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The American Farm Bureau, Inc., Anew Telecommunications Corporation d/b/a Call America, Creative Interconnect, Inc., Enhanced Communications Network, Inc., the Utilities Commission of New Smyrna Beach, and A+ American Discount Telecom, LLC (the "Joint Commenters"), by their attorneys, respectfully submit these Joint Comments in response to the Commission's *Further Notice of Proposed Rulemaking* in the above-captioned proceeding.[1]

The Joint Commenters range from nationwide integrated service providers to small, regional CLECs. All are members of the Save American Free Enterprise in Telecommunications Coalition ("SAFE-T"), which has been created to provide competitive local exchange carriers ("CLECs") with an economical and effective means to represent their interests in regulatory

[1] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 96-98, 98-147 and 01-338 (rel. Aug. 21, 2003) (the "*Further Notice*").

proceedings and before legislators where the continued availability of basic rights and access to critical resources in the possession of incumbent local exchange carriers ("ILECs") granted them under the Telecommunications Act of 1996 ("the 1996 Act") (47 U.S.C. §§ 151 *et seq*.) is in question.

I. SUMMARY OF ARGUMENT

There are few rights granted by Congress to CLECs in the Telecommunications Act that are more important in promoting local exchange competition than the "pick-and-choose" provision of Section 252(i) of the Act and section 51.809 of the Commission's rules. Although these Comments will proceed to explicate the issue in greater detail, these Comments can be summed up in one unambiguous statement: The Commission may not tamper with the pick-and-choose rule because it is a statutory directive of the Act, and it must not and should not resort to the tortured construct set forth in the *Further Notice* in an effort to strike a "balance"[2] that Congress did not perceive or countenance in mandating the pick-and-choose provision. The pick-and-choose rule is pro-competitive, it has worked well to fulfill the competitive goals of the Act, and it has caused no discernable harm to the interconnection agreement negotiation and arbitration process established by the Act. The Commission should uphold a policy to "first, do no harm" to the competitive objectives of the Act, and leave the rule in place undisturbed.

In light of the clarity of the statutory language, the Commission's definitive 1997 interpretation of the statute based on its legislative history as well as that plain language,[3] and the Supreme Court's strong and unanimous endorsement of that interpretation in *AT&T v. Iowa*

[2] *Further Notice* at ¶ 728.
[3] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order in CC Docket Nos. 96-98 and 95-185, 11 FCC 2d 15499, 16132-40 (1996) ("*Local Competition Order*").

Utilities Board,[4] this Commission could not consider abolishing or modifying the rule absent compelling need and conclusive evidence that its present formulation is disserving Congress' objectives in the Act. Thus far, in the *Further Notice*, the Commission merely tentatively concludes "based on our experience" that the current rule "discourages the sort of give-and-take negotiations that Congress envisioned," apparently on the basis of nothing more than the claim of a single CLEC and the supportive comments of the ILECs, who for obvious reasons have always opposed the pick-and-choose rule.[5] And indeed, that CLEC recently withdrew the petition for rulemaking upon which the *Further Notice* rests, and evidently now supports retention of the existing rule.[6]

Several of these Joint Commenters have fruitfully invoked the pick-and-choose rule in negotiating their interconnection agreements with ILECs, and all share the firm conviction that the current rule enhances competition and, specifically, enables smaller competitors who otherwise would have little or no negotiating leverage to attain fair and non-discriminatory interconnection arrangements with ILECs. Based on *that* experience, we expect that the vast majority of other CLEC commenters in this proceeding have similarly benefited from the current rule, and regard its retention as critical to the achievement of just, reasonable and non-discriminatory interconnection agreements for the provision of competitive local exchange services.

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[4] 525 U.S. 366, 395-96 (1999). Although several Justices of the Court dissented from parts of Justice Scalia's Opinion of the Court, all (except Justice O'Connor, who did not participate in the case) joined in Part IV of Justice Scalia's opinion affirming the pick-and-choose rule. *See* 525 U.S. at 369.

[5] *See Further Notice* at ¶ 722 and n.2144.

[6] *See* letter submitted by Mpower Communications Corp. in this proceeding, filed Oct. 14, 2003.

II. THE PICK-AND-CHOOSE RULE IS STATUTORY IN NATURE

It is strange that the Commission would embark upon this inquiry, in light of the plain language of the Act and the U.S. Supreme Court's unambiguous holding with respect to that language. Section 252(i) of the Act is unusual among the statute's many provisions in terms of its simplicity and clarity:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.[7]

Congress did not say that an ILEC shall make available to another requesting carrier "any agreement" to which it is a party – which language might support the "all or nothing" approach proposed in the *Further Notice*; to the contrary, Congress specified that the ILEC "shall make available *any* interconnection, service or network element *provided under* an agreement … to which it is a party."[8] The Commission in 1996 recognized this important and specific Congressional language in adopting the current rule.[9]

The legislative history of the Telecommunications Act further clarifies that Congress contemplated that competitors must be able to "pick and choose" existing provisions of interconnection agreements, rather than being chained to an "all or nothing" option as tentatively proposed in the *Further Notice*. The legislative history reveals that Section 252(i) had no counterpart provision in the House version of the Act, H.R. 1555,[10] but rather is derived from Section 251(g) of the Senate bill, S. 652. As described in the underlying Senate Report:

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[7] 47 U.S.C. § 252(i).
[8] *Id.* (emphasis added).
[9] *Local Competition Order*, 11 FCC 2d at 16138 ¶ 1310 (1996).
[10] *See* H.R. Rep. No. 104-204 (1995).

> New section 251(g) requires a local exchange carrier to make available any service, facility, or function provided under an interconnection agreement to which that local exchange carrier is a party to any other telecommunications carrier that requests such service, facility, or function on the same terms and conditions as are provided in that agreement. *The Committee intends this requirement to help prevent discrimination among carriers and to make interconnection more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated*.[11]

In the Conference Committee that forged the final Act, the House largely receded to the pertinent Senate provisions.[12] In agreeing upon the final version of Section 252(i), the Conference Report reveals that the Committee adopted a formulation virtually identical to the Senate provision:

> New section 252(i) requires a local exchange carrier to make available on the same terms and conditions to any telecommunications carrier that requests it any interconnection, service, or network element that the local exchange carrier provides to any other party under an approved agreement or statement.[13]

In its 1997 Local Competition Order wherein the current pick-and-choose rule was adopted, the Commission agreed that "section 252(i)'s language does not differ substantively from the text of the Senate bill's section 251(g)."[14]

Indeed, this Commission must take note that the instant proposal, to abolish the pick-and-choose rule and replace it with a right to adopt either provisions of a state-approved SGAT or to adopt another interconnection agreement in its entirety or not at all, resembles the House bill provision that was discarded in favor of Section 252(i). The Conference Committee's Joint Explanatory Statement described that rejected House bill provision – Section 244(d) of H.R. 1555 – as follows:

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[11] S. Rep. No. 104-23, at 21-22 (1995) (emphasis added).
[12] *See* S. Rep. No. 104-230, Joint Explanatory Statement of the Committee of Conference, at 125-26 (1995) ("Joint Explanatory Statement").
[13] *Id.* at 126.
[14] *Local Competition Order*, 11 FCC Rcd at 16138 ¶ 1311 (1997).

> Section 244(d) allows an exchange carrier to file an agreement as a statement of services under section 244(a). It also permits exchange carriers to enter into subsequent agreements on different terms and conditions, but with two caveats. First, the subsequent agreement must undergo the same review process, and second, it may not be discriminatory with respect to other agreements it has entered into.[15]

Thus, the legislative history reveals clearly that Congress, in enacting Section 252(i), explicitly chose a close variation of the Senate's "pick and choose" provision over a more indefinite, SGAT-reliant provision with a non-discrimination safeguard – the very type of formulation that this Commission now seems to be proposing in the *Further Notice*. In short, a close examination of the legislative history makes crystal clear that the Commission in 1996 faithfully adhered to Congressional intent in adopting the pick-and-choose rule, and that this Commission must steer clear of the less inclusive, less competitive approach that the Congress explicitly rejected but that the Commission now proposes.

III. THE SUPREME COURT HAS ENDORSED THE CURRENT RULE, AND PROVIDED THE APPROPRIATE TEST FOR REVIEWING IT

The Eighth Circuit – like the *Further Notice* – found fault with the pick-and-choose rule,[16] but the Supreme Court manifestly did not. In overruling the lower court and reinstating the current rule, Justice Scalia, writing for all eight participating Justices, found that the pick-and-choose rule "tracks the pertinent statutory language almost exactly," and moreover, that "[t]he FCC's interpretation is not only reasonable, it is the most readily apparent." The Court found further that "in some respects the rule is more generous to incumbent LECs than § 252(i) itself," *e.g.*, insofar as it allows an ILEC to "require a requesting carrier to accept all terms that it

[15] Joint Explanatory Statement at 125.
[16] *See Iowa Utilities Board v. FCC*, 120 F.3d 753, 800-01 (8th Cir. 1997), *reversed in part sub nom. AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999).

can prove are 'legitimately related' to the desired term." The Court concluded: "Section 252(i) certainly demands no more than that."[17]

The *Further Notice*, in attempting to downplay or rationalize the Court's strong endorsement of the current rule, appears to dissemble. Certainly, it is true and relevant that the Court in *Iowa Utilities Board* also stated:

> And whether the Commission's approach will significantly impede negotiations (by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions) is a matter eminently within the expertise of the Commission and eminently beyond our ken.[18]

However, it is puzzling that the *Further Notice* goes far afield of this statement in its declaration that "the ambiguous nature of [Section 252(i)'s phrase "upon the same terms and conditions"] *prompted the Supreme Court to conclude that the appropriate interpretation of Section 252(i) is 'eminently within the Commission's expertise'*."[19] There is utterly no support for this Commission statement. The Supreme Court said no such thing and saw no such ambiguity; on the contrary, the Court stated flatly that the rule tracks the statute "almost exactly" and that the 1996 Commission's interpretation was both "reasonable" and "the most readily apparent." The plain language of this last statement of the Court permits the Commission to revisit and perhaps modify the rule <u>if</u> the Commission finds – presumably supported by substantial evidence, rather

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[17] *Iowa Utilities Board,* 525 U.S. at 396. The Eighth Circuit "acknowledge[d] that the words 'any interconnection, service, or network element' *could* indicate that the FCC's approach was intended by Congress," but nevertheless found that it had leeway to vacate the rule based on its view that "these words do not foreclose the possibility that an entrant's selection of an individual provision of a prior agreement would require it to accept the terms of the entire agreement." *Iowa Utilities Board v. FCC*, 120 F.3d at 800 n.22 (emphasis added). In striking down this decision and reinstating the rule, the Supreme Court saw no such ambiguity, finding that current rule "tracks the pertinent language almost exactly" and "is the most readily apparent" interpretation of the statute. 525 U.S. at 396.

[18] *Id.*

[19] *Further Notice* at ¶ 728 (*quoting* 525 U.S. at 396) (emphasis added; footnote omitted).

than conclusory assertions – that the current rule "significantly impede[s] negotiations (by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions)." This high Court pronouncement, rather than the *Further Notice*'s far more flexible standard (abolition of the current rule is warranted "provided the Commission's modified rule remains a reasonable interpretation of the statutory text"[20]), provides the appropriate standard of review of the current rule. Such evidence presumably would come primarily or at least substantially from the testimony of the affected "requesting carriers," *i.e.*, the CLECs, and not primarily from the ILECs who wish to be freed from the rule.[21] If such testimony by most commenting CLECs is not forthcoming in this proceeding, then the plain words of the Court in *Iowa Utilities Board* preclude the abolition of the rule as proposed in the *Further Notice*.

IV. THE COMMISSION'S SGAT-BASED ALTERNATIVE IS INCONSISTENT WITH THE TELECOMMUNICATIONS ACT

What is not apparent at all from the foregoing is that Congress in the Act, or the Supreme Court in *Iowa Utilities Board*, could *possibly* have envisioned a substitute rule so convoluted that it would actually impose duties on a large class of ILECs that Congress expressly chose not to impose in the Act. As the *Further Notice* acknowledges, the SGAT provision of Section 252(f) applies only to Bell Operating Companies (BOCs), and not to non-BOC ILECs.[22] Indeed,

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[20] *Id.* at ¶ 721.

[21] As noted earlier, the only CLEC that the Commission has cited as opposing the existing rule has notified the Commission that it has reversed that position. *See supra* note 6.

[22] *See id.* at ¶ 727. Section 252(f) (47 U.S.C. § 252(f)) provides:

> "(f) STATEMENTS OF GENERALLY AVAILABLE TERMS.–
>
> "(1) IN GENERAL.–A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section

Section 252(f) is the only provision of Section 252 that applies only to BOCs and not to other ILECs. Simply stated, and as the Commission has noted, the Act provides that only BOCs "may prepare and file with a State commission a [SGAT]."[23] Thus, it is impossible to conclude that Congress could have contemplated in Section 252(i) that all ILECs could satisfy that provision by offering only the terms of an SGAT to CLECs, to the exclusion of the individual provisions of negotiated and arbitrated interconnection agreements.

Further, the above-discussed legislative history of the Act, on its face, makes abundantly clear that Congress in the Conference Committee affirmatively chose the preference for negotiated interconnection agreements embodied in Section 251 of the Senate bill over a regime that would rely to a greater degree on SGATs, embodied in the discarded section 244 of the House bill. Yet the discarded approach is at the very essence of the modification proposed in the *Further Notice*: "once an incumbent LEC obtains state approval of a statement of generally available terms and conditions (SGAT) pursuant to section 252(f) – which essentially functions as a standardized interconnection agreement – the incumbent LEC and competitive carriers then would be permitted to negotiate alternative agreements that third parties could opt into only in their entirety or not at all."[24]

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251 and the regulations thereunder and the standards applicable under this section."

[23] *See, e.g. Core Communications, Inc. v. Verizon Maryland, Inc.*, FCC 03-96 (rel. April 23, 2003) at ¶ 4 ("Under the statutory scheme of the 1996 Act, the terms and conditions for interconnection typically appear in interconnection agreements that incumbent LECs and competitive LECs either negotiate or arbitrate pursuant to section 252. The Bell Operating Companies, however, also have the option to effectuate interconnection agreements by 'prepar[ing] and fil[ing] with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder, and the standards applicable under [section 252]'" (footnotes omitted)).

[24] *Further Notice*, at ¶ 713. *Compare* H.R. Rep. 104-204, Part 1 at 6 (House bill section 244) *with* S. Rep. No. 104-23 at 19-22 *and* Joint Explanatory Statement at 125-26.

Finally, the SGAT provision of Section 252(f) was designed as an option for BOCs, so that they could apply for interLATA operating authority in a state under Section 271(c)(1)(B) even if no CLEC has requested an interconnection agreement in that state. By filing a statement of generally available terms and gaining the state's approval of it, a BOC could demonstrate that the local exchange market in that state had been "opened" to competition even in the absence of an actual competitor.[25] Over time, the SGAT option has fallen into relative disuse as competitors have arisen and multiple interconnection agreements have been negotiated and arbitrated in most states. It would be passing strange if the Commission were now to expand the SGAT vehicle to encompass ILECs generally rather than only BOCs, and to grossly elevate it in importance as its new chosen method of implementing Section 252(i), notwithstanding that Congress never even mentioned SGATs in the context of that section's requirements.

V. THE FURTHER NOTICE'S ANALYSIS OF THE PICK-AND-CHOOSE RULE IS FLAWED AND ERRONEOUS

The Commission in the *Further Notice* asserts that the current rule "discourages the sort of give-and-take-negotiations that Congress envisioned" because "incumbent LECs seldom make significant concessions in return for some trade-offs for fear that third parties will obtain equivalent benefits without making any trade-off at all."[26] In addition to the fact that the Commission cites only self-serving ILEC comments in support of this proposition,[27] the *Further Notice* completely ignores that which the 1996 Commission anticipated and addressed, and the Supreme Court recognized and approved. As the Court noted in *Iowa Utilities Board*:

[25] *See* 47 U.S.C. § 271(c)(1)(B); Joint Explanatory Statement at 148.
[26] *Further Notice* at ¶ 722.
[27] *Id.* at n.2144.

> in some respects the rule is more generous to incumbent LECs than § 252(i) itself. It exempts incumbents who can prove to the state commission that providing a particular interconnection service or network element to a requesting carrier is either (1) more costly than providing it to the original carrier, or (2) technically infeasible. 47 CFR § 51.809(b) (1997). And it limits the amount of time during which negotiated agreements are open to requests under this section. § 51.809(c). The Commission has said that an incumbent LEC can require a requesting carrier to accept all terms that it can prove are "legitimately related" to the desired term. First Report & Order ¶ 1315.[28]

In particular, the "legitimately related" restriction assures that the hypothetical harms imagined by the *Further Notice* do not and will not incur. As Justice Scalia emphatically concluded, "Section 252(i) certainly demands no more than that."[29]

Moreover, the *Further Notice*'s assertion evinces a fundamental misunderstanding of the functioning and the pro-competitive value of the pick-and-choose rule. Even to the extent that the rule may result in such reticence by ILECs (which extent is impossible to measure reliably, inasmuch as ILECs routinely resist negotiating on any number of interconnection provisions sought by CLECs), such difficulty is more than offset by countervailing benefits of the rule; namely, the ability of a CLEC to opt into an existing interconnection agreement and augmenting it with certain provisions of other agreements that render the agreement more closely suited to the needs and business plan of the CLEC. In other words, a CLEC can conclude an appropriate interconnection agreement with an ILEC far more quickly and efficiently when it can opt into another carrier's agreement (*e.g.*, AT&T or MCI), and then augment it with discrete provisions of one or more other agreements that will render the finished product far more suited to the CLEC's particular requirements. Several of these Joint Commenters have invoked the pick-and-choose rule precisely to this end, to "fill in" necessary provisions to their interconnection

[28] 525 U.S. at 396.
[29] *Id.*

agreements.[30] This is an independent, and huge, benefit of the pick-and-choose rule that is available whether or not the ILEC will negotiate on other desired provisions. In short, the pick-and-choose rule may result in imperfect agreements for smaller CLECs, but agreements that nonetheless are far superior to what a small CLEC would be able to negotiate on its own with a monopoly ILEC that holds all the leverage.

Finally, and critically, the rule assures roughly non-discriminatory treatment of smaller CLECs – a paramount goal of the Act that would be satisfied *not at all* by the *Further Notice*'s alternative. The *Further Notice* states vaguely that ILECs "would remain subject to the nondiscrimination provisions and other safeguards in section 201 and 202 of the Act,"[31] but fails to state how such discrimination would be avoided. Simply stated, the instant proposal would permit smaller CLECs to take only from a "lowest common denominator" collection of SGAT terms, while large CLECs can negotiate far more favorable, and discriminatory, terms on their own. Indeed, the Commission's proposal would necessarily result in discriminatory treatment that favors larger, better resourced CLECs *vis-à-vis* smaller providers. While, of course, competitors can seek to prosecute Section 208 complaints long after it is too late, such a "safeguard" is a far cry from the explicit Congressional intent underlying Section 252(i), namely "to help prevent discrimination … *by making available to others the individual elements of agreements that have been previously negotiated.*[32]

[30] For example, one of the Joint Commenters this week has opted into one existing interconnection agreement while adopting a single augmenting provision from another existing ILEC agreement in the same state.
[31] *Further Notice* at ¶ 726.
[32] S. Rep. 104-23, at 22 (emphasis added). *See supra* note 11 and accompanying text.

VI. CONCLUSION

Much will be written about the pick-and-choose rule in this proceeding, but the most succinct and accurate testimony to its importance is found in the *Local Competition Order*:

> Unbundled access to agreement provisions will enable smaller carriers who lack bargaining power to obtain favorable terms and conditions – including rates – negotiated by large IXCs, and speed the emergence of robust competition.[33]

These Joint Commenters can provide competitive local services because of the fundamental truth of this statement under the current rule that Congress commanded and the Commission faithfully adopted. The Commission must not contort and distort this statutory mandate.

Respectfully submitted,

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October 16, 2003

[33] *Local Competition Order*, at 16138-39 ¶ 1313 (footnote omitted).